

STAND. COM. REP. NO. **2700**

Honolulu, Hawaii

**FEB 28 2014**

RE: S.B. No. 2463  
S.D. 2

Honorable Donna Mercado Kim  
President of the Senate  
Twenty-Seventh State Legislature  
Regular Session of 2014  
State of Hawaii

Madam:

Your Committee on Judiciary and Labor, to which was referred  
S.B. No. 2463, S.D. 1, entitled:

"A BILL FOR AN ACT RELATING TO PROCUREMENT, "

begs leave to report as follows:

The purpose and intent of this measure is to:

- (1) Provide that the requirement for persons licensed under chapter 444, Hawaii Revised Statutes, to defend a governmental body, or its officers, employees, or agency from claims arising out of the contractor's performance under the contract shall not extend beyond the expiration of the time limitation in section 657-8, Hawaii Revised Statutes; and
- (2) Clarify that no person licensed under chapter 464, Hawaii Revised Statutes, who agrees to defend a governmental body shall be required to defend a governmental body in a lawsuit filed more than ten years beyond the owner's final acceptance of the project, rather than substantial completion of the project.

Your Committee received testimony in support of this measure from the Department of the Attorney General; State Procurement Office; Hawaii Insurers Council; American Society of Civil Engineers; American Council of Engineering Companies of Hawaii; Fukunaga & Associates, Inc.; The Limtiaco Consulting Group; Bow Engineering & Development, Inc.; Shigemura, Lau, Sakanashi,

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Higuchi and Associates, Inc.; Gray Hong Nojima & Associates, Inc.; Coalition of Hawaii Engineering & Architectural Professionals; ParEn, Inc. dba Park Engineering; Community Planning and Engineering, Inc.; Austin, Tsutsumi & Associates, Inc.; General Contractors Association of Hawaii; Building Industry Association-Hawaii; Subcontractors Association of Hawaii; SSFM International; and one individual. Your Committee received comments on this measure from Insurance Factors and one individual.

Your Committee finds that contracts for public works often include a duty to defend clause, requiring the contractor to defend governmental entities before the contractor's negligence or fault is determined. Public works often involve large risks due to site circumstances, public environmental concerns, and high public usage. Highways and public buildings have necessarily long service lives relative to other services procured, thereby increasing the contractor risk beyond that of other government contracts.

Your Committee further finds that duty to defend clauses in public works contracts are detrimental to design professionals and construction contractors in the long-term because such clauses negatively affect competition for contracts and innovation. While some state and county agencies recognize the negative implications and have removed the duty to defend clauses from contracts for public works, inconsistencies between agencies and departments exist. Therefore, this measure standardizes different contract conditions regarding the duty to defend clause.

Your Committee notes the formation of an informal working group composed of the General Contractors Association of Hawaii, design professionals, Department of the Attorney General, and State Procurement Office to develop language. Your Committee further notes that the language developed by this working group has received support from various stakeholders.

Accordingly, your Committee has amended this measure by adopting the language suggested by the working group to:

- (1) Amend the purpose section to provide further information regarding duty to defend clauses and the consequences these type of clauses have on licensed design professionals and construction contractors;



- (2) Clarify that beginning July 1, 2014, no contract that is entered into by any governmental body with a design professional licensed under chapter 464, Hawaii Revised Statutes, shall require the contractor to defend the governmental body, or its officers, employees, or agency from claims arising out of the contractor's performance under the contract;
- (3) Specify that the requirement for contractors licensed under chapter 444, Hawaii Revised Statutes, to defend a governmental body, or its officers, employees, or agency from claims arising out of the contractor's performance under the contract shall not extend beyond the owner's final acceptance of the project and the contractor's warranty period up to a minimum of one year after final acceptance;
- (4) Require a licensed contractor's duty to defend to also apply to claims arising out of any subcontractor's performance pursuant to the contract; and
- (5) Change the effective date from July 1, 2050, to July 1, 2014.

As affirmed by the record of votes of the members of your Committee on Judiciary and Labor that is attached to this report, your Committee is in accord with the intent and purpose of S.B. No. 2463, S.D. 1, as amended herein, and recommends that it pass Third Reading in the form attached hereto as S.B. No. 2463, S.D. 2.

Respectfully submitted on  
behalf of the members of the  
Committee on Judiciary and  
Labor,



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CLAYTON HEE, Chair



**Record of Votes**  
**Committee on Judiciary and Labor**  
**JDL**

\*Only one measure per Record of Votes